

Case 6:05-cv-00041-JPJ Document 73 Filed 11/01/06 Page 1 of 2 Pageid#: 295

8. While under Virginia law, a defendant in a tort case is not entitled to a reduction in an award of future lost wages to reflect the income taxes that would have been paid on the earnings, such a reduction for federal income taxes has been approved in FTCA cases. As stated by the Fourth Circuit in *Flannery v. United States*, 718 F.2d 108, 111 (4th Cir. 1983), “it has now been repeatedly held that federal income taxes must be deducted in computing lost future earnings, notwithstanding the fact that such deductions are not permitted under state law.” However, “the burden is on the government to raise the issue and to prove the extent of the reduction.” *Musick v. United States*, 781 F. Supp. 445, 453 (W.D. Va. 1991); see also *Jovanovich v. United States*, 813 F.2d 1035, 1037 (9th Cir. 1987); *Barnes v. United States*, 685 F.2d 66, 69 (3d Cir. 1982); *United States v. Cline*, 410 F.2d 1337, 1343 (9th Cir. 1969). The government has not raised the issue in this case and takes the position that the holding in *Flannery* has been “effectively overruled” by *Molzof v. United States*, 502 U.S. 301 (1992). In any event, in the absence of any evidence in that regard, a reduction in future lost earnings for federal income taxes will not be applied.

It is so **ORDERED**.

ENTER: November 1, 2006

/s/ JAMES P. JONES

Chief United States District Judge